BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BILLY WAYNE BIRMINGHAM, SR.	)	
Claimant	)	
VS.	)	
	)	Docket No. 208,094
DEFFENBAUGH DISPOSAL SERVICES	)	
Respondent	)	
AND	)	
	)	
ITT HARTFORD INSURANCE (SRS)	)	
Insurance Carrier	)	

ORDER

Claimant and respondent appeal the Award of Administrative Law Judge Brad E. Avery dated February 17, 1998, and the Award Nunc Pro Tunc dated February 24, 1998, wherein claimant was awarded a 2.5 percent whole body disability. Oral argument was held December 15, 1998.

APPEARANCES

Claimant appeared by his attorney, James E. Martin of Overland Park, Kansas. Respondent and its insurance carrier appeared by their attorney, Steven C. Alberg of Overland Park, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as set forth in the Award and the Award Nunc Pro Tunc of the Administrative Law Judge are adopted by the Appeals Board. In addition, the Appeals Board considered the deposition of Jeff McDonald, Volume II, dated May 2, 1997, with attached surveillance tape, the transcript of motion hearing dated June 9, 1997, the deposition of Gary Birmingham dated September 3, 1997, and the deposition of Jesse Thomas dated September 3, 1997, as part of the record. The Appeals Board did not consider, for purposes of this Order, the deposition of David A. Tillema, M.D., dated June 12, 1997. The Appeals Board's reasons for rejecting this deposition are explained below.

ISSUES

Claimant raises the following issues:

(1) Did the trier of fact improperly consider the discovery deposition of claimant dated February 9, 1996?

(2) Did the trier of fact fail to consider the motion contained in the transcript of motion hearing dated June 9, 1997, and the Order entered thereafter by Administrative Law Judge Julie A. N. Sample on June 10, 1997?

(3) Did the trier of fact fail to include in the record the evidentiary deposition of Jeff McDonald, Volume II, of May 2, 1997?

(4) Did the trier of fact improperly consider the evidentiary deposition of David A. Tillema, M.D., and did respondent's attorney violate the Order of Administrative Law Judge Alvin E. Witwer entered June 7, 1996?

(5) Did the Administrative Law Judge improperly apply a credit of 2.5 percent for a preexisting condition without evidence made in accordance with the AMA Guides to the Evaluation of Permanent Impairment to determine same?

(6) Did the trier of fact fail to include in the record and fail to consider the evidentiary deposition of the Reverend Jesse Thomas?

(7) Did the trier of fact improperly state the claimant's entitlement to future medical treatment?

Respondent raises the following issues:

(1) What is the nature and extent of claimant's injury and/or disability resulting from the alleged accident of December 7, 1995?

(2) Should claimant be assessed costs and/or have other sanctions imposed due to misrepresentation regarding his post-work activities, including misrepresentations regarding his

physical condition, causing respondent to incur unnecessary costs in taking additional depositions?

(3) Should the entry of the Award in these proceedings be stayed pending the outcome of criminal proceedings filed against claimant arising from facts related to these proceedings? This issue was withdrawn by agreement of the parties at oral argument.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Claimant suffered accidental injury on December 7, 1995, while working as a driver for Deffenbaugh Disposal Services. The truck claimant was driving was a tip-over cab style truck, which allowed the entire truck body to tip forward, allowing the mechanics access to the engine compartment. On the date of the accident, claimant applied his brakes and, for unknown reasons, the tip-over cab went forward, taking claimant with it. Claimant struck his head and his leg, and may have been temporarily dazed or perhaps knocked unconscious. Claimant was referred to the Business and Industry Clinic for medical treatment, where he was examined by Stephen J. Kracht, D.O., and returned to full duty the next day. Shortly after that, however, Dr. Kracht limited claimant to light duty, and claimant was moved to a position in respondent's recycling center. Claimant testified the recycling center was too cold, causing him difficulties with his back. Claimant was shortly thereafter transferred to a different job, repairing inner tubes in the tire shop.

Respondent provided information to indicate claimant's transfer to the tire shop related to a dispute between claimant and a supervisor, during which claimant accused the supervisor of discrimination. Regardless, claimant was transferred to a permanent job in the tire shop, which was within his restrictions, and paid a comparable wage.

Claimant began receiving treatment with Dr. Jonathan D. Chilton, a board certified neurosurgeon, on February 2, 1996, as a referral from Dr. Kracht. Dr. Chilton reviewed x-rays of claimant, which revealed mild to moderate degenerative changes at L5-S1 bilaterally. He testified that claimant did not have clear evidence of a recent trauma, which would have required a fracture or subluxation. He felt claimant's symptoms arose from a low back strain, but did not rule out the possibility of a herniated disc. An MRI was performed on March 27, 1996, which revealed mild to moderate central canal stenosis and

a central disc herniation at L4-L5. Dr. Chilton did not believe the changes on the MRI scan were significant enough to produce any nerve compression or nerve compromise and, therefore, the diagnosis remained as a lumbar strain or musculoskeletal soft tissue injury. Dr. Chilton limited claimant to 50 pounds pushing, pulling and lifting.

Following the March 27, 1996, examination, Dr. Chilton indicated that claimant's leg numbness and tingling, and leg pain had resolved, with only occasional discomfort. Claimant's back was also apparently improving. Dr. Chilton was shown the videotape of claimant from December 1996 and March 1997, but saw nothing inconsistent on the videotape in relation to claimant's resolving complaints.

While Dr. Chilton did give an opinion regarding what, if any, permanent impairment claimant suffered from this case, he also acknowledged that he is only vaguely familiar with the AMA Guides to the Evaluation of Permanent Impairment. He testified he cannot profess to understand these guides, and any opinion he would have given regarding functional impairment would not have resulted from his use of the AMA Guides.

Claimant was later examined by Dr. David A. Tillema, a board certified orthopedic surgeon. Dr. Tillema examined claimant pursuant to a court order for an independent medical evaluation issued by Administrative Law Judge Alvin E. Witwer on June 7, 1996. In that order, counsel for respondent was instructed to make arrangements for the examination appointment with the physician at the physician's earliest convenience, and to furnish any previous relevant medical reports and records to Dr. Tillema. Both attorneys were admonished to refrain from further contact with the doctor without the Court's approval, except to provide additional information that the doctor might request.

While the attorney for respondent followed this Order at the time of the evaluation and the preparation of the report, the respondent's attorney did contact Dr. Tillema ex parte on May 1, 1997, and provided Dr. Tillema with a copy of the surveillance videotape of claimant. As a result of viewing the videotape, Dr. Tillema changed his opinion regarding claimant's functional impairment. Dr. Tillema originally gave claimant an 8 percent loss of impairment, pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised). After viewing the videotape, Dr. Tillema reduced his opinion under the AMA Guides, Third Edition (Revised), to 5 percent, as he felt that claimant's loss of motion evaluation was inaccurate. He also issued an opinion regarding claimant's functional impairment using the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, and found claimant to have a 5 percent whole person impairment under that version as well.

In his medical report of July 25, 1996, Dr. Tillema opined that 80 percent of claimant's total impairment was attributable to his work-related injury of December 7, 1995, and 20 percent can be attributed to claimant's preexisting arthritic degenerative changes.

On May 15, 1996, claimant was examined by Dr. Nathan Shechter, an orthopedic surgeon, at the request of his attorney. Dr. Shechter reviewed x-rays of claimant's lumbar spine, which indicated degenerative changes at L4-5 and L5-S1, with narrowing at L5-S1 interspace and L4-5 interspace as well. No evidence of fracture or dislocation was found. He also reviewed the MRI report, which indicated spinal stenosis and a central disc herniation at L4-5, with degenerative changes between L3-4 and L5-S1. He also noted disc bulging at L2-3, but felt that disc bulge was not causing claimant any symptoms. Claimant's problem was occurring at the L4-5 level.

Dr. Shechter restricted claimant from lifting over 50 pounds maximum, with frequent lifting of up to 25 pounds. He also recommended claimant avoid excessive pushing or pulling, prolonged periods of driving in a car, and prolonged periods of sitting or standing. Dr. Shechter assessed claimant a 19 percent whole body functional impairment pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. However, on cross-examination, Dr. Shechter acknowledged that, when considering claimant's objective findings, the functional impairment would actually be in the range of 7 percent to the body as a whole. He also acknowledged that, of that 7 percent, 50 percent would be attributable to claimant's degenerative conditions, and 50 percent to claimant's December 1995 injury. Dr. Shechter did not provide an opinion regarding claimant's functional impairment pursuant to the AMA Guides, Third Edition (Revised).

On Wednesday, February 28, 1996, while claimant was assigned to the tire repair shop, Thomas Steck, the workers' compensation administrator for respondent, attempted to contact claimant to see how he was doing. He was unable to locate the claimant, and was told by a coworker that claimant may have gone to therapy. This was unusual, as arrangements had been made for claimant to leave at 1:00 or 1:30 p.m., so that he could go to therapy in the afternoon. On that particular day, claimant was scheduled to go to therapy at 2:00 p.m. Claimant returned to respondent's shop at approximately 1:00 or 1:30 p.m. in the afternoon, which was just shortly before claimant was normally scheduled to leave. When asked where he had been, claimant advised he had picked his wife up to go to the hospital to see their newborn baby, who had jaundice and was still in the hospital.

After this incident, Mr. Steck reviewed claimant's time cards and found other instances where claimant had failed to clock in, but had instead written a time on the time card and signed his initials. This was in violation of company policy, as employees are not entitled to write in their own times, but must have a supervisor do it instead. Claimant was

aware of this rule, as he had earlier, after being transferred from driving, been involved in a situation where he forgot to clock in and a supervisor initialed his card.

After a review of claimant's time cards, it was discovered that there were several policy breaches, and more than one situation where claimant punched in and then left work for personal reasons. Respondent then terminated claimant's employment.

The testimony of several witnesses was taken in the record regarding a videotape created by Jeff McDonald, a private investigator in Lenexa, Kansas. In the videotape, claimant is shown on several occasions driving, loading and unloading a pickup owned by his son, Billy Wayne Birmingham, Jr. The claimant's activities on the tape include hauling trash for a company called Alfordable Hauling. A dispute exists in the record regarding whether claimant is the owner of Alfordable Hauling or merely working as an advisor for his son. The videotape is significant in that it shows claimant doing repeated bending, stooping, and lifting of items which could weigh up to 50 pounds, although there does not appear to be any single item which exceeds the 50-pound lifting limit placed upon claimant by Dr. Chilton.

It is significant that claimant denied any income from this business, asserting it all belonged to his son. Virginia Leritz, the member service support manager for the Federal Employees Credit Union, provided information indicating that claimant was involved in the business of Alfordable Hauling and was on the account's signature card with his wife. The son, whom claimant alleged was the owner of the business, however, was not on the signature cards and had no right to access the credit union accounts of Alfordable Hauling.

CONCLUSIONS OF LAW

With regard to the transcript of claimant's discovery deposition, the transcript of motion hearing and Order, the evidentiary deposition of Jeff McDonald, Volume II, and the evidentiary deposition of the Reverend Jesse Thomas, the Appeals Board finds all are properly a part of the record. They were all considered in this appeal.

However, the evidentiary deposition of David A. Tillema, M.D., requires closer scrutiny. The Order of Administrative Law Judge Witwer was specific regarding what, if any, contact was allowed by the attorneys with Dr. Tillema. Even though the contact by respondent's attorney was after Dr. Tillema's report was prepared, it did, nevertheless, have a direct influence on Dr. Tillema's testimony and his opinion regarding claimant's functional impairment and limitations. The Appeals Board finds this contact did violate the Order of Judge Witwer and, therefore, the deposition of Dr. Tillema will not be considered. However, the report of Dr. Tillema was provided on July 25, 1996. The contact between Dr. Tillema and respondent's attorney did not occur until May 1, 1997. Therefore,

Dr. Tillema's report was not tainted by this contact, and will be considered by the Appeals Board.

In that report, Dr. Tillema opined pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised), that claimant had a total functional impairment of 8 percent to the body as a whole. He also stated that 80 percent of this resulted from claimant's injury and 20 percent resulted from claimant's preexisting degenerative condition. This results in a 6.4 percent functional impairment for this injury. K.S.A. 44-501(c) states in part:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

In considering claimant's functional impairment and what, if any, preexisting percentage he may have had, the Appeals Board has rejected the opinion of Dr. Chilton. K.S.A. 44-510e requires that, when computing functional impairment, the appropriate edition of the AMA Guides be utilized. For injuries occurring before April 4, 1996, the Third Edition (Revised) version is to be utilized. For injuries occurring on or after April 4, 1996, the Fourth Edition of the AMA Guides will be utilized. As claimant's injury occurred in December 1995, the appropriate version in effect would be the AMA Guides, Third Edition (Revised). Dr. Chilton used neither. While he acknowledged being vaguely familiar with the AMA Guides, he did not profess to understand them and did not use them in assessing claimant's permanent impairment. Therefore, Dr. Chilton's opinion regarding claimant's functional impairment is rejected by the Appeals Board.

Dr. Shechter utilized only the Fourth Edition of the AMA Guides. The Appeals Board finds that the opinion of Dr. Shechter does not comply with K.S.A. 44-510e. Therefore, the Appeals Board, for the purpose of this Order, considers the medical report of Dr. Tillema as the most credible medical evidence, and finds claimant has suffered an 8 percent whole body functional impairment resulting from this injury. In the Award, the Administrative Law Judge followed Dr. Tillema's testimony regarding what, if any, preexisting functional impairment claimant may have had. At the time of Dr. Tillema's deposition, he modified his impairment to 5 percent to the body as a whole and also modified his preexisting impairment to 50 percent of that assessed claimant. The Appeals Board has stricken Dr. Tillema's testimony from the record, and found the most credible medical evidence is from Dr. Tillema's July 1996 report. In that report, he assessed claimant an 8 percent whole body functional impairment, of which 20 percent preexisted. Therefore, the Appeals Board finds claimant is entitled to a 6.4 percent whole body functional impairment for the injuries suffered on December 7, 1995.

In addition to his functional impairment, claimant alleges entitlement to a substantial work disability in this matter. With regard to the nature and extent of claimant's disability, the Appeals Board must first consider whether claimant has violated the principles set forth in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). In Foulk, the Kansas Court of Appeals held that the Workers Compensation Act in Kansas should not be construed to award benefits to a worker solely for refusing a proper job that the worker has the ability to perform.

In this instance, respondent offered, and claimant accepted, a comparable-paying job within claimant's restrictions in the tire shop. After respondent discovered claimant was absent from work without authorization after having clocked in, respondent terminated claimant's employment.

K.S.A. 44-510e restricts an employee from receiving permanent partial general disability compensation in excess of the functional impairment as long as the employee is engaging in work for wages equal to 90 percent or more of the average gross weekly wage the employee was earning at the time of the injury.

Here, claimant was returned to work by respondent at a comparable wage at a job within his medical restrictions. Only through claimant's willful violation of company policy did claimant lose this position. Not all violations of company policy involve the policy considerations of Foulk. But, in this instance, the Appeals Board finds that claimant's actions do violate the principles of Foulk. The loss of claimant's accommodated job paying 90 percent or more of his average weekly wage resulted from claimant's violation of respondent's company policy. Had this violation not occurred, claimant could have continued working for respondent at a comparable wage. The Appeals Board, therefore, will impute the wage claimant was earning at the time of the termination. As this was more than 90 percent of claimant's average weekly wage on the date of accident, claimant is limited to his functional impairment.

Respondent further argues that claimant should be assessed the costs related to the deposition of Virginia Leritz. Respondent contends that this deposition would not have been necessary had claimant been honest regarding his ownership interest in Alfordable Hauling. The Appeals Board finds claimant's actions do not rise to a level sufficient to allow costs to be assessed against claimant. The costs of the Leritz deposition will remain against respondent and its insurance carrier.

Claimant appealed the issue dealing with his entitlement to future medical care. In the Award, the Administrative Law Judge found claimant to be entitled to future medical care upon application and review. This language allows claimant the opportunity to present to the Director of Workers Compensation evidence which would allow him to obtain

post-award medical care. The Appeals Board finds no reason to modify this order and affirms same.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated February 17, 1998, and an Award Nunc Pro Tunc dated February 24, 1998, should be, and are hereby, modified, and claimant, Billy Wayne Birmingham, Sr., is granted an award against the respondent, Deffenbaugh Disposal Services, and its insurance carrier, ITT Hartford Insurance (SRS), for an injury suffered on December 7, 1995, and based upon an average weekly wage of $464.54. Claimant is entitled to 26.56 weeks permanent partial disability compensation at the rate of $309.71 per week totaling $8,225.90 for a 6.4 percent whole body functional impairment, all of which is due and owing and ordered paid in one lump at the time of this Award minus any amounts previously paid.

Pursuant to K.S.A. 44-536, claimant's contract of employment with his counsel is approved insofar as it does not contradict the statute.

Claimant is entitled to future medical care upon application to and review by the Director. Claimant is denied unauthorized medical care for Dr. Shechter's evaluation pursuant to K.S.A. 44-510(c)(2).

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Metropolitan Court Reporters	
Deposition of Virginia Leritz	$305.70
Evidentiary Deposition of Jeff McDonald	$327.90
Evidentiary Deposition of Jeff McDonald	$187.90
Deposition of Jonathan D. Chilton, M.D.	$309.70
Deposition of David A. Tillema, M.D.	$397.50
Evidentiary Deposition of Thomas J. Steck	$367.10
Evidentiary Deposition of Billy Wayne Birmingham	Unknown
Evidentiary Deposition of Monty Longacre	$286.70
Hostetler & Associates, Inc.	
Transcript of Motion Hearing	$125.00

Discovery Deposition of Billy Wayne Birmingham	$205.90
Richard Kupper & Associates	
Transcript of Regular Hearing	$342.20
Rebecca J. Ramsay, RPR	
Deposition of Billy Wayne Birmingham, Jr.	$192.00
Deposition of Gary Birmingham	$103.00
Deposition of Jesse Thomas	$127.00
Deposition of Nathan Shechter, M.D.	$330.50
Deposition of Michael Dreiling	$354.90

IT IS SO ORDERED.

Dated this ____ day of April 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James E. Martin, Overland Park, KS
Steven C. Alberg, Overland Park, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director